No. 78-551

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

BODCAW COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
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Washington, D.C. 20530

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1. Respondent is in error in stating (Br. in Op. 3, 6, 8-9, 11) that the government did not make an on-site inspection and appraisal of the property until after the suit was filed, and respondent also errs in stating (Br. in Op. 3, 6, 8-9, 11) that the government did not introduce at the trial any evidence of the value of the property that was based on an on-site appraisal.

a. The suit was filed in 1971 and came to trial in 1975 (Pet. App. 15a-16a). At the trial, John W. Bowen, Jr., the government appraiser, testified as follows (Tr. 483-484):

> Q: Have you made a physical inspection of the Bodcaw property?
>
> A: Yes, I have. I reviewed the original appraisal reports, which were made on the Bodcaw properties in the beginning of the late 1960's. * * * [W]e began appraisals on the Bodcaw property in each one, the

late 1960's. Then we continued the appraisals through about 1969.

I made an appraisal myself in 1974 of the property involved.

Q: And you went on to the property at that time?

A: That is right.

Consistent with Bowen's testimony, and contrary to respondent's assertion, appraisals for negotiation purposes began in 1967 and ended in 1970.[1] The on-site inspection by Bowen in 1974 was made for trial purposes.

This is a typical pattern in land acquisitions, and, contrary to respondent's suggestion, it is in no way inequitable. As we stated in our petition (Pet. 9-11), when cases go to trial the government frequently relies on a fresh appraisal made shortly before trial. The expert who conducted the original, pre-negotiation appraisal may be unavailable to testify, pretrial rulings may alter the assumptions on which the original appraisal was made, or the government may conclude that a more current appraisal would be more persuasive at trial. The government here did conduct on-site inspections and appraisals for negotiation purposes before the suit was filed, and there was nothing unusual or unfair about its subsequently conducting a new inspection and appraisal shortly before the trial.

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[1]Bowen's testimony concerning the appraisals made in the late 1960's refers to valuations of the property made by other government appraisers. The records of the Corps of Engineers reflect that the property was appraised, following on-site inspections, by two Corps of Engineers appraisers in 1967 and 1968. These appraisals were updated by the same two appraisers in 1970. See also Tr. 555-556, where Bowen, on cross-examination, testified to appraisals, in which he assisted, in 1967, 1968, and 1969.

Respondent's suggestion (Br. in Opp. 6, 9-10) that the government violated 42 U.S.C. 4651(2) is incorrect, since that statute was not enacted until 1971, after the time that the pre-suit appraisals were conducted.

b. The government's evidence at the trial did include evidence of the value of the property that was based on an on-site appraisal. The witness Bowen, who had made an on-site inspection in 1974 in connection with his appraisal at that time (Tr. 483-484, quoted page 2, *supra*), testified to the value of the property on the basis of his inspection and appraisal. Bowen first described in detail his "physical inspection" of the property in 1974.[2] He then described the property itself (Tr. 489-493), and went on to describe the properties involved in some 20 sales that he considered comparable (Tr. 503-525). In summarizing his appraisal process, he stated (Tr. 527):

> I inspected the property and I inspected the sales, I compared the sales as to its highest use and its comparability so that I could give an indication as to the value of the sales. This would be as near as possible in time, location, having similar soils, similar characteristics, elevations and flood habits. Each sale was compared to the subject property on an overall basis. * * *

On this basis, Bowen testified to his estimates of the value of the property before and after the taking (Tr. 547).

2. Respondent also errs in its reliance on two treatises on eminent domain law (Br. in Op. 4-5). The excerpt from 4A Nichols, *Eminent Domain* § 14.249, at 351 (3d ed. 1977), merely states the well established principle that ordinarily costs may not be assessed against a landowner in an eminent domain proceeding. In a portion of that discussion not quoted by respondent, the treatise points

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[2]*E.g.* (Tr. 488): "I looked at the entire property in this manner to estimate the amount of timber that was in the right-of-way, also to see if there were any improvements in the right-of-way. This was also to see what kinds of lands were there, the type of timber that was grown on the lands, the soil, the drainage probiems, the drainage characteristics of the land or the drainage characteristics of the lands, the contour of the land connected with this. * * *"

out that this is a corollary of the principle that costs may not be awarded to either side in an eminent domain action absent specific statutory authorization. *Id.* at 351-352. This principle reflects the governing federal law. See Fed. R. Civ. P. 71A(1); Advisory Committee Notes, 28 U.S.C., page 7844.

The excerpt from the 1909 edition of the Lewis treatise, 2 Lewis, *Eminent Domain*, § 812, at 1434-1435 (3d ed. 1909) (Br. in Opp. 4), states the writer's view that the condemnor should be required to "pay all the expenses" incident to determining just compensation in an eminent domain proceeding. Although the discussion of this point is not entirely clear, Lewis appears to have been referring to the costs of the condemnation proceeding itself rather than litigation expenses incurred by landowners. See *id.* at 1435 n.6. If the writer meant to refer to expenses such as appraisal fees, however, this Court subsequently rejected that view in *Dohany* v. *Rogers*, 281 U.S. 362, 368 (1930), where it held that expenses are not embraced in just compensation for land taken by eminent domain.

3. Finally, respondent's characterization of the award in this case as resting on constitutional compulsion (Br. in Opp. 9-10, 11) helps demonstrate the degree to which the decision below departs from well-settled principles of just compensation. The cost of appraisal is simply not part of the value of the property, and just compensation is "for the property and not to the owner." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). In suggesting that such costs are to be awarded as a matter of constitutional compulsion, respondent and the court of appeals are proposing a fundamentally different concept of just compensation, a concept that would have expansive impact on land condemnation actions by both federal and state governmental units.[3]

[3]Other condemnees have not read the Fifth Circuit's decision in this case narrowly. In the Southern District of Florida, the United States has filed approximately 7000 condemnation actions in connection with the establishment of the Big Cypress National Preserve, 16 U.S.C. 698f, and it is estimated than another 7000 actions will be filed in connection with that project in the future. Since the Fifth Circuit's decision in this case, the answers to the complaints in condemnation have regularly included a claim for appraisal costs.

For these reasons and for the reasons given in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978.